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In the Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD LUCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a preliminary ruling by the district court, denying petitioner's motion to limit the government's ability to cross-examine him about a prior conviction, was reviewable on appeal after petitioner declined to testify at trial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Summary of argument	7
Argument:	
The district court's preliminary ruling denying petitioner's motion to prohibit cross-examination about a prior conviction was not reviewable on appeal after petitioner declined to testify at trial	10
A. The ruling was necessarily tentative and any injury to petitioner was purely speculative	10
B. It is not unfair to require a defendant to testify in order to preserve his claim that impeachment evidence was inadmissible	19
Conclusion	32

TABLE OF AUTHORITIES

Cases:

Blackledge v. *Perry*, 417 U.S. 21	28
Bordenkircher v. *Hayes*, 434 U.S. 357	23
Brady v. *United States*, 397 U.S. 742	22-23, 26
Brooks v. *Tennessee*, 406 U.S. 605	13, 14, 22, 23
Brown v. *United States*, 356 U.S. 148	23
Chaffin v. *Stynchcombe*, 412 U.S. 17	12, 26
Corbitt v. *New Jersey*, 439 U.S. 212	25
Crampton v. *Ohio*, 402 U.S. 183	13, 23, 25, 26, 28
Fay v. *Noia*, 372 U.S. 391	28
Garner v. *United States*, 424 U.S. 648	24
Gordon v. *United States*, 383 F.2d 936, cert. denied, 390 U.S. 1029	11
Government of the Virgin Islands v. *Bedford*, 671 F.2d 758	17

Cases—Continued: Page

Green v. *United States*, 355 U.S. 184 28
Gruenwald v. *United States*, 353 U.S. 391 19
Harris v. *New York*, 401 U.S. 222 23
Harrison v. *United States*, 392 U.S. 219 23
Hubbard v. *Wilson*, 401 F. Supp. 495 19
Jenkins v. *Anderson*, 447 U.S. 231 ..... 19, 23, 25
Kotteakos v. *United States*, 328 U.S. 750 17
Lefkowitz v. *Newsome*, 420 U.S. 283 26
Leno v. *Gaughan*, 664 F.2d 314 19
Luck v. *United States*, 348 F.2d 763 11
Marshall v. *Lonberger*, 459 U.S. 422 20
McDonough Power Equipment, Inc. v. *Greenwood*, No. 82-958 (Jan. 18, 1984) 31
McGautha v. *California*, 402 U.S. 183 13
McMann v. *Richardson*, 397 U.S. 759 ..... 26, 27
Middendorf v. *Henry*, 425 U.S. 25 ..... 20, 25
Namet v. *United States*, 373 U.S. 179 26
New Jersey v. *Portash*, 440 U.S. 450 ..... *passim*
Raffel v. *United States*, 271 U.S. 494 19
Selective Service System v. *Minnesota Public Interest Research Group*, No. 83-276 (July 5, 1984) 23
South Dakota v. *Neville*, 459 U.S. 553 25
Spencer v. *Texas*, 385 U.S. 554 19-20
State v. *Rodriguez*, 126 Ariz. 28, 612 P.2d 484 10
Strickland v. *Washington*, No. 82-1554 (May 14, 1984) 26
United States v. *Banks*, 687 F.2d 967, cert. denied, 459 U.S. 1212 12
United States v. *Barletta*, 644 F.2d 50 21
United States v. *Beechum*, 582 F.2d 898, cert. denied, 440 U.S. 920 15
United States v. *Belt*, 514 F.2d 837 19
United States v. *Burkhead*, 646 F.2d 1283, cert. denied, 454 U.S. 898 21
United States v. *Burns*, 684 F.2d 1066, cert. denied, No. 82-5609 (Jan. 24, 1983) 16-17
United States v. *Calderon*, 348 U.S. 160 ..... 26, 28
United States v. *Ciampaglia*, 628 F.2d 632, cert. denied, 449 U.S. 956 21
United States v. *Clark*, 732 F.2d 1536 31

Cases—Continued: Page

United States v. *Cobb*, 588 F.2d 607, cert. denied, 440 U.S. 947 15
United States v. *Cook*, 608 F.2d 1175, cert. denied, 444 U.S. 1034 ..... *passim*
United States v. *Cox*, 464 F.2d 937 17
United States v. *Curcio*, 712 F.2d 1532 16
United States v. *Fountain*, 642 F.2d 1083, cert. denied, 451 U.S. 993 31
United States v. *Gaertner*, 705 F.2d 210 11-12
United States v. *Grayson*, 438 U.S. 41 ..... 13, 19, 23, 25
United States v. *Gustafson*, 728 F.2d 1078 21
United States v. *Hasting*, No. 81-1463 (May 23, 1983) 17, 30
United States v. *Hickey*, 596 F.2d 1082, cert. denied, 444 U.S. 853 22
United States v. *Johnston*, 543 F.2d 55 22
United States v. *Jorn*, 400 U.S. 470 28
United States v. *Kahn*, 472 F.2d 272, cert. denied, 411 U.S. 982 22
United States v. *Key*, 717 F.2d 1206 ..... 11, 22
United States v. *Knox*, 396 U.S. 77 27
United States v. *Kordel*, 397 U.S. 1 27
United States v. *Lace*, 669 F.2d 46, cert. denied, 459 U.S. 854 17
United States v. *LeBlanc*, 612 F.2d 1012, cert. denied, 449 U.S. 849 ..... 13, 27
United States v. *Lipscomb*, 702 F.2d 1049 30-31
United States v. *McCollum*, 732 F.2d 1419 ..... 15, 16
United States v. *Mehrmanesh*, 682 F.2d 1303 12
United States v. *Oakes*, 565 F.2d 170 31
United States v. *Pantone*, 634 F.2d 716 13
United States v. *Rivers*, 693 F.2d 52 ..... 21, 30
United States v. *Simpson*, 709 F.2d 903, cert. denied, No. 83-5496 (Oct. 31, 1983) 17
United States v. *Spero*, 625 F.2d 779 17
United States v. *Spinella*, 506 F.2d 426, cert. denied, 423 U.S. 917 14
United States v. *Tercero*, 640 F.2d 190, cert. denied, 449 U.S. 1084 22
United States v. *Thibadeau*, 671 F.2d 75 17

Cases—Continued: Page

United States v. *Toney*, 615 F.2d 277, cert. denied, 449 U.S. 985 ..... 12, 18, 31
United States v. *Witschner*, 624 F.2d 840, cert. denied, 449 U.S. 994 ..... 22, 23
Wainwright v. *Sykes*, 433 U.S. 72 26
Walder v. *United States*, 347 U.S. 62 12
Walker v. *City of Birmingham*, 388 U.S. 307 26
Williams v. *Florida*, 399 U.S. 78 23

Constitution, statutes and rules:

U.S. Const.:
Art. III 20
Amend. V 24
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
28 U.S.C. 2111 24
Ill. Ann. Stat. ch. 56½ (Smith-Hurd Supp. 1984-1985):
§ 710 4
§ 1402 5
Fed. R. Crim. P.:
Rule 11(a)(2) 16
Rule 12(b) 20, 21, 26
Rule 12(e) 20, 21
Rule 12(f) 26
Rule 52(a) 24
Fed. R. Evid.:
Rule 103(a) 24
Rule 103(a)(2) 30
Rule 404 advisory committee note (b) 15
Rule 404(b) 15, 16
Rule 609 ..... *passim*
Rule 609(a) 4, 5, 20
Rule 609(a)(1) 8, 11, 15

Miscellaneous:

Black's Law Dictionary (5th ed. 1979) 10
Comment, *Conditioned Guilty Pleas: Post-Guilty Plea Appeal of Nonjurisdictional Issues*, 26 U.C.L.A. L. Rev. 360 (1978) 17

Miscellaneous—Continued: Page

D. Epstein & D. Austern, Crim. Just. Sec., ABA, *Uniform Rules of Criminal Procedure: Comparison and Analysis* (July 1975) 17
Note, *Conditional Guilty Pleas*, 93 Harv. L. Rev. 564 (1980) 17
Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L.J. 763 (1961) .. 15
R. Traynor, *The Riddle of Harmless Error* (1970) .. 30
Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 Mich. L. Rev. 1265 (1978) 17
Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214 (1977) 17
Westen & Mandell, *To Talk, to Balk, or to Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response"*, 19 Am. Crim. L. Rev. 512 (1982) 23, 24, 26, 29, 32

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 713 F.2d 1236.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1983. A petition for rehearing was denied on October 3, 1983 (Pet. App. 14a). The petition for a writ of certiorari was filed on December 1, 1983, and granted on March 26, 1984 (J.A. 31). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of conspiracy and possession with intent to distribute cocaine, in violation of 21 U.S.C. 846 and 841(a)(1). He was sentenced to concurrent terms of four years' imprisonment, to be followed by a three-year special parole term, and fined $3000 on each count. The court of appeals affirmed. Pet. App. 1a-13a.[1]

1. The evidence at trial, the sufficiency of which is not in dispute, established that James Luigs, Robert Kolofer, and petitioner conspired to sell cocaine to Dallas Luigs on October 1, 1981. Dallas Luigs had been arrested by local police officers several days before for possession of two and one-half ounces of cocaine that he had bought from his cousin, co-defendant James Luigs (Tr. 67). He agreed to cooperate to avoid prosecution (Tr. 41-42, 126-127). Accordingly, he telephoned his cousin (Tr. 43) to arrange the purchase of more cocaine (Tr. 67).

James Luigs, who was a business associate of petitioner's (Tr. 44), flew from Chicago to Memphis on October 1 to consummate the sale. As they had done before, the two cousins drove to a Holiday Inn parking lot (Tr. 68-69).[2] James Luigs then went into the

[1] Petitioner was acquitted on one count of possession with intent to distribute cocaine. Co-defendant James Luigs was also convicted on one count each of conspiracy and possession. Co-defendant Robert Kolofer was convicted on one count of possession. The court of appeals also affirmed their convictions.

[2] Dallas Luigs had been introduced to petitioner in the summer of 1981 (Tr. 44) and had twice purchased cocaine from him (Tr. 46-49). On one occasion petitioner sold cocaine to Dallas Luigs from a warehouse in Chicago (Tr. 46). On the second occasion petitioner flew to Memphis and distributed cocaine out of the trunk of an automobile parked at the Holiday Inn (Tr. 48-49). James Luigs also flew to Memphis twice and sold his cousin cocaine from the trunk of a car parked at the Holiday Inn (Tr. 50-53).

hotel, returned with Kolofer (Tr. 69), and opened the trunk of a Mercury parked in the lot. In the trunk was an attache case. James Luigs opened the case and took out a brown paper bag; inside the bag was another plastic bag, and in that were several smaller bags containing cocaine (Tr. 70, 207-208). Memphis police officers watching the parking lot then arrested James Luigs and Kolofer (Tr. 70, 133-134, 153-157). Petitioner's fingerprints were found on the larger cocaine-filled plastic bag (Tr. 227, 245, 262-263).[3] The Mercury was also circumstantially tied to petitioner: in 1980 petitioner had gone to an automobile dealership in a Chicago suburb and ordered the car. When the car was delivered, however, it was registered in the name of Richard R. Clark (Tr. 187-189). Police investigation revealed that no such person lived at the address given. No current driver's license was issued to a Richard R. Clark, and agents were unable to locate any such individual (Tr. 363-366).

[3] As part of its direct case the government introduced a card bearing petitioner's fingerprints, taken in December 1978 (Tr. 245; GX 13). Petitioner requested an instruction that the prints were not taken in connection with a criminal matter (Tr. 248), even though they had been taken when petitioner was picked up for a probation violation (Tr. 337). The court instructed the jury that it was not to draw any inference from the fact that petitioner's fingerprints had been taken previously (Tr. 250-251).

In December 1981, DEA agents obtained a warrant for petitioner's arrest on the charges involved in this case. When they went to his office to execute it petitioner was not there; the agents left word for him to call them (Tr. 361-363). About an hour and a half later police officers saw petitioner entering a car parked behind the office. They approached him, identifying themselves, and petitioner sped away. After a high-speed chase, converging police cars were able to stop petitioner and effect the arrest (Tr. 374-377).

2. At trial petitioner filed a motion in limine to restrict the government from using a 1974 conviction to impeach him if he chose to testify (J.A. 4-5). In the motion petitioner asserted that the conviction had been expunged upon his successful completion of probation and contended that it was inadmissible under Fed. R. Evid. 609(a) because it did not involve dishonesty or false statement and because its prejudicial effect outweighed its probative value. In a mid-trial hearing outside the jury's presence, counsel reiterated that either petitioner had been discharged under state law (see Ill. Ann. Stat. ch. 56½, § 710 (Smith-Hurd Supp. 1984-1985)), or the prior conviction—allegedly for possession of marijuana—had been expunged (Tr. 336; see J.A. 11). The government responded that it had no evidence of petitioner's discharge or expungement (J.A. 10). State records did show that he had been arrested in 1978 for a probation violation relating to that conviction (Tr. 337-356). Petitioner did not rebut the government's contention and introduced no evidence of discharge or expungement.

Petitioner then argued that the probative value of this prior conviction for possession of marijuana was

outweighed by its prejudicial effect, and that it should accordingly be excluded under Rule 609(a)(1) of the Federal Rules of Evidence (J.A. 11-12).[4] The court agreed that if the prior conviction was for the possession of marijuana it would not be sufficiently probative of petitioner's honesty to be admissible (J.A. 13, 14-15). The government represented, however, that petitioner had been convicted for possession of a controlled substance under an Illinois statute that did not include marijuana (Tr. 356-357; Ill. Ann. Stat. ch. 56½, § 1402 (Smith-Hurd Supp. 1984-1985)). When petitioner was unable to rebut the government's claim, the district court ruled that a conviction for a controlled substance other than marijuana was a "crime involving moral turpitude" that fell within the category of permissible impeachment evidence. Accordingly, it declined to exclude the prior conviction altogether (J.A. 19-21). The court noted that "if [petitioner] goes * * * into other elements, I don't know anything about drugs, I have never had any dealing with drugs * * * then the door is open to the government to go into the matter of credibility as it relates to the defendant in respect of a prior conviction or a prior offense" (J.A. 21-22).

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[4] Rule 609(a) provides:

> General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

The court ruled, however, that petitioner could give limited testimony explaining his flight to avoid arrest without being impeached by his prior conviction (J.A. 16-17, 21-22).

Petitioner chose not to testify at trial. Although he now claims (Br. 17) that the in limine ruling "forc[ed]" him to remain off the stand, petitioner did not assert before the district court that his decision not to testify was based on the anticipated impeachment, nor did he make an offer of proof or otherwise outline his proposed testimony.

3. On appeal, petitioner contended that the district court abused its discretion in denying the motion in limine without making a specific finding that the probative value of the prior conviction outweighed its prejudicial effect. The court of appeals declined to reach the issue because petitioner had not testified at trial and his prior convictions accordingly were not offered into evidence against him. Pet. App. 2a-12a.

The court advanced a number of reasons why a defendant who chooses not to testify should not be permitted to challenge the court's in limine ruling on appeal. First, an advisory ruling on a motion in limine is by definition preliminary, subject to change by the trial court "for whatever reason, when the evidence is actually offered and objected to at trial" (Pet. App. 6a (footnote omitted)). Second, because the trial court has discretion not to rule on motions in limine, overturning convictions on the basis of such rulings will ultimately discourage the practice of giving advisory rulings (*ibid.*). Third, a reviewing court in a case such as this would lack the "concrete factual basis [that] is required for appellate review of the merits of the evidence's admissibility" (*id.* at 8a). Indeed, here there was not even any

indication that petitioner "was actually precluded from testifying by fear of impeachment or whether his testimony would have significantly aided his defense" (*ibid.*). Finally, allowing review here would make it impossible for the appellate court to decide whether the district court's error was harmless, since the court of appeals would have before it neither the defendant's proposed testimony nor the details of the government's cross-examination (*id.* at 7a-8a).

SUMMARY OF ARGUMENT

Petitioner obtained an in limine ruling from the district court on the admissibility of a prior conviction for impeachment purposes. He subsequently chose not to testify at trial, and was convicted. Despite the preliminary nature of the decision on his motion and the lack of any record evidence that he would have testified had he prevailed on it, petitioner challenged the ruling before the court of appeals. That court properly declined to review the ruling. Any injury to petitioner arising out of the in limine ruling is wholly speculative. Reviewing decisions to admit evidence under Rule 609 only when a defendant has testified and the challenged evidence has actually been admitted over his objection at trial violates no right of petitioner and serves the important government interests of preventing defendants from manufacturing artificial claims for appeal and from securing reversals of convictions without a clear showing of prejudicial error.

An in limine motion such as petitioner's seeks an advisory ruling on an evidentiary issue that may arise at trial. A court normally need not decide such a motion. When it does, the parties may take the ruling into account as one factor among many in plan-

ning their trial strategy. The decision nonetheless is only a preliminary indication of how the court expects to rule. The ruling is subject to change if the court determines that its discretion should be exercised differently in light of the actual course of the trial, and the point may be moot if the prosecution elects not to introduce the evidence despite a favorable ruling on the motion in limine. It makes little sense to treat an in limine ruling as final and reviewable on appeal when it is recognized as tentative in the district court. Petitioner's claim of prejudice assumes not only that the ruling would have remained unchanged, but also that he would have testified but for the ruling and that the government would actually have offered the prior conviction to impeach his testimony. Moreover, an appellate court cannot properly review the balancing required under Rule 609(a)(1) outside the concrete context of actual testimony, nor can it determine whether any error was harmless.

Any injury that petitioner may claim from the in limine ruling is accordingly purely speculative. There is no evidence in the record that petitioner would have testified had he prevailed on the motion, nor did he make an offer of proof as to what his testimony would have been. Whether the government would have been able to offer the prior conviction on some ground other than Rule 609, or whether the evidence would have been offered at all, can only be guessed. Nor can one know how or on what basis the district court would ultimately have ruled had it been presented with the issue in the concrete context of petitioner's actual testimony at trial. Whether a decision admitting evidence of the conviction at trial would have been error and, if so, whether such an error

would have been harmless similarly cannot be ascertained on this record.

In contrast to the hypothetical injury that petitioner asserts stands the concrete claim of prejudice that he could have made had he actually taken the stand and the evidence been admitted. There is of course no question but that a ruling actually admitting the prior conviction over petitioner's objection would have been reviewable on appeal. Deciding whether to testify—and thereby to obtain a reviewable evidentiary ruling—is just one of a number of difficult tactical choices that a defendant must make. But the fact that it is difficult does not mean that a defendant must be permitted to escape the consequences of his choice by challenging a preliminary ruling without taking the stand. A defendant has no constitutional right to an in limine ruling, nor does the erroneous admission of a prior conviction rise to the level of a constitutional violation. In such circumstances, there is no persuasive claim to a right to challenge an in limine ruling on appeal, nor is there any unfairness in limiting a defendant's evidentiary challenges on appeal to evidence that was actually introduced at trial.

Far from being constitutionally mandated or necessary to ameliorate unfairness, reviewability of in limine rulings such as the one at issue here would offer defendants undue opportunity to seek to inject reversible error without sufficient countervailing benefits to the judicial process. A decision by this Court that such rulings are reviewable would be seen as an invitation to defendants to file numerous in limine motions respecting matters that may in fact not be critical to their decision whether to testify, in the hope that one might be erroneously denied and thus

provide the basis for overturning a conviction. One court of appeals has sought to diminish this risk by conditioning reviewability on a defendant's commitment on the record to testify if the motion is granted, and to make an offer of proof regarding the content of his proposed testimony—conditions petitioner did not satisfy. But even these precautions would be of only limited assistance in discouraging unwarranted motions, because any such commitment would be unenforceable at trial and review of the correctness of the in limine ruling would remain unduly speculative in the absence of the defendant's actual testimony at trial.

ARGUMENT

THE DISTRICT COURT'S PRELIMINARY RULING DENYING PETITIONER'S MOTION TO PROHIBIT CROSS-EXAMINATION ABOUT A PRIOR CONVICTION WAS NOT REVIEWABLE ON APPEAL AFTER PETITIONER DECLINED TO TESTIFY AT TRIAL

A. The Ruling Was Necessarily Tentative And Any Injury To Petitioner Was Purely Speculative

An in limine ruling gives the parties a preliminary indication of how the court intends to decide an evidentiary question should the evidence actually be offered at trial.[5] Such a tentative ruling, even if erroneous, cannot in itself provide the type of concrete injury and complete factual record necessary for proper review on appeal.

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[5] "In limine" means "[o]n or at the threshold; at the very beginning; preliminarily" (*Black's Law Dictionary* 708 (5th ed. 1979). While it is sometimes taken to refer only to motions made before trial, it is often used, as we use it here, to refer to any motion, whether before or during trial, "to exclude anticipated prejudical evidence before the evidence is actually offered by the opposing party." *State* v. *Rodriguez*, 126 Ariz. 28, 30, 612 P.2d 484, 486 (1980).

1. In limine motions are commonly used to obtain advisory rulings on evidentiary issues before the evidence is offered for admission at trial. There is normally no right to such an advance ruling. See pages 20-22, *infra*. When an in limine ruling is made, it may provide useful guidance for the parties, but it is nonetheless only an advisory determination, subject to change. See Pet. App. 5a-6a; *United States* v. *Key*, 717 F.2d 1206, 1208 (8th Cir. 1983) (per curiam). As petitioner acknowledges (Br. 14-15), the court retains the ability to modify its initial ruling based on the actual course of the trial.

This is particularly necessary in the context of Rule 609(a)(1), because a court cannot exercise its discretion in balancing the probative value and prejudicial effect of a prior conviction without taking into account factors that depend on the course of trial, such as the defendant's actual testimony and the decisiveness of his credibility. See *United States* v. *Key*, 717 F.2d at 1208-1209; see generally *Luck* v. *United States*, 348 F.2d 763 (D.C. Cir. 1965); *Gordon* v. *United States*, 383 F.2d 936 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968). For example, impeachment evidence may assume an unanticipated relevance where the defendant affirmatively denies involvement in the sort of activity that was the subject of a prior conviction.[6] See *United States* v.

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[6] Indeed, the district court in the instant case may have intended to admit the prior conviction only in such circumstances. The difficulty in determining the district court's precise ruling (see J.A. 16-17, 19-20, 21-22) is itself a reason for precluding review of it on appeal. See *New Jersey* v. *Portash*, 440 U.S. 450, 467-471 (1979) (Blackmun, J., dissenting). The court apparently agreed to exclude the prior drug conviction if the defendant limited his testimony to his flight before arrest, but said that it would be admitted if the defend-

Gaertner, 705 F.2d 210, 216-217 (7th Cir. 1983); *United States* v. *Mehrmanesh*, 682 F.2d 1303, 1309 (9th Cir. 1982); cf. *Walder* v. *United States*, 347 U.S. 62 (1954). It would be anomalous to treat an in limine ruling as final and reviewable if the defendant does not take the stand even though it is clearly subject to change if the defendant does indeed testify and the evidence is offered.[7] Cf. *United States* v. *Toney*, 615 F.2d 277, 282 (5th Cir.) (Tjoflat, J., concurring) (describing difficulties inherent in considering an in limine ruling final), cer denied, 449 U.S. 985 (1980).

2. A number of other factors also contributes to the necessarily speculative nature of any injury that may be claimed as a result of an limine ruling. Cf. *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 33 (1973) ("[s]everal contingencies must coalesce" before injury could occur). Most important, there can be no assurance that the defendant whose in limine motion to exclude evidence was denied would actually have taken the stand had he prevailed on the motion. See *New Jersey* v. *Portash*, 440 U.S. 450, 467 (1979) (Blackmun, J., dissenting). In the present case, "[t]here is * * * no hint in the record from which

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ant denied prior involvement with illegal drugs (J.A. 21-22). In an important respect, then, the court ruled in favor of petitioner, who made no showing of what his testimony would have been or, in particular, whether he desired to testify with respect to any subject other than his flight before arrest.

[7] Because in limine rulings are inherently subject to change, it makes little sense to preclude review, as does the Seventh Circuit, only where the district court explicitly reserves the right to reconsider its decision. See *United States* v. *Banks*, 687 F.2d 967, 970-972 (7th Cir. 1982), cert. denied, 459 U.S. 1212 (1983).

[a reviewing court] can decide whether Luce was actually precluded from testifying by fear of impeachment" (Pet. App. 8a).

There are in fact several considerations that the defendant and his counsel must weigh in deciding whether he should take the stand. See, *e.g.*, *Crampton* v. *Ohio* (decided with *McGautha* v. *California*, 402 U.S. 183, 214-216 (1971)); *United States* v. *Grayson*, 438 U.S. 41, 57 (1978) (Stewart, J., dissenting). In *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), for example, this Court held that it is unconstitutional to require a defendant to decide whether to testify before any other defense witnesses have testified, because of the defendant's crucial need of "an opportunity to evaluate the actual worth of [his] evidence" (*id.* at 612) in deciding whether he should take the stand.[8] See *United States* v. *Cook*, 608 F.2d 1175, 1189 (9th Cir. 1979) (en banc) (Kennedy, J., dissenting in part and concurring in part) ("the actual conduct of the trial is a significant, and legitimate, factor in a defendant's election to testify or remain silent"), cert. denied, 444 U.S. 1034 (1980). Thus, while an in limine ruling may be an important factor in the defendant's decision, it cannot normally be regarded as decisive in itself. *New Jersey* v. *Portash*, 440 U.S. at 467 (Blackmun, J., dissenting) (an accused's decision whether to testify "seldom turns on the resolution of one factor among many"). See also *United States* v. *LeBlanc*, 612 F.2d 1012, 1014 (6th Cir.), cert. denied, 449 U.S. 849 (1980); cf. *United States* v. *Pantone*, 634 F.2d 716, 723 (3d Cir. 1980). Certainly it should not simply be presumed to be the

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[8] Here, petitioner in fact called another witness after the court's ruling (see Tr. 431).

basis for the defendant's decision, as petitioner would have this Court do.

A requirement that a defendant, "by a statement of his attorney * * * establish on the record that he will in fact take the stand and testify" (*Cook*, 608 F.2d at 1186) thus should be a minimum prerequisite to reviewability—one petitioner cannot satisfy here. Even that rule, while preferable to requiring no record at all, is hardly sufficient to convert a hypothetical injury into one concrete enough to support reviewability. See pages 30-31 note 22, *infra*. Because such an undertaking is unenforceable (see generally *Brooks*, 406 U.S. at 613), there can be no assurance that a defendant has in fact decided not to testify solely because of the in limine ruling or that, if the ruling be reversed, he will take the stand upon retrial. Cf. *United States* v. *Spinella*, 506 F.2d 426 (5th Cir.), cert. denied, 423 U.S. 917 (1975).

An in limine ruling also provides insufficient proof of injury because the government could decide at trial to forgo the use of a prior conviction for impeachment purposes even though the court has indicated that it would probably admit the evidence. See generally *New Jersey* v. *Portash*, 440 U.S. at 467 (Blackmun, J., dissenting). The prosecutor may, for example, decide that there is sufficient impeachment evidence apart from the prior conviction, or that the defendant's testimony did not effectively counter his case. Such forbearance is particularly likely where the balance between prejudicial effect and probative value is close, so that there is a real risk of reversal. In such a situation the prosecutor is more likely to choose to protect a conviction from attack on appeal than to introduce evidence that does not appear necessary to his case. See *United States* v. *Cobb*, 588 F.2d 607, 613 (8th Cir.), cert. denied, 440 U.S. 947 (1979).

Finally, a prior conviction that a court erroneously ruled admissible under Rule 609 may properly have been admissible under a different rationale. For example, other crimes may be admitted for a variety of purposes under Rule 404(b). See, *e.g.*, *United States* v. *McCollum*, 732 F.2d 1419, 1424 (9th Cir. 1984). Here again, however, the admissibility of the evidence depends in large part on the actual course of trial. See *United States* v. *Beechum*, 582 F.2d 898, 914 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L.J. 763, 771-773 (1961); Fed. R. Evid. 404 advisory committee note (b).

3. In view of all of these contingencies, there can be no assurance that a defendant was actually prejudiced by even a demonstrably erroneous in limine ruling under Rule 609. Appellate review is also problematic because, in the absence of a concrete record of a defendant's trial testimony and the admission of a prior conviction, an appellate court can neither review the district court's exercise of discretion nor determine whether the error, if any, was harmless. Appellate review of the balancing required under Rule 609(a)(1)[9] is hampered in the absence of a

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[9] Petitioner's contention (Br. 15) that the district court "never attempted any balancing" is belied by the court's ruling that the evidence would be admissible if petitioner denied prior involvement with drugs (in which case it would have significant probative value), but not if he limited his testimony to explaining his flight before arrest (where the probative value would be less). See J.A. 21-22.

trial record for the same reasons that the district court requires such a record. See page 11, *supra*. The record is especially vital for review purposes because it will place the district court's exercise of discretion in a factual context. Review of an in limine ruling outside such a context will tend to be a largely academic inquiry rather than a determination of the reasonableness of an exercise of discretion. Compare *United States* v. *McCollum*, 732 F.2d at 1424-1426 (concluding that probative value outweighed prejudicial effect of prior conviction under Rule 404 (b) where defendant did not take the stand) with 732 F.2d at 1428-1429 (Reinhardt, J., dissenting) (concluding that prejudicial effect outweighed probative value).

In order to determine the effect of error on a trial, moreover, an appellate court normally must carefully review a complete factual record.[10] See *United States*

[10] An exception arises where the error is "case-dispositive," that is, where it affects the very ability of the government to introduce sufficient evidence to convict the defendant, as is often the case with rulings on suppression motions. Erroneous evidentiary rulings seldom fall into that category.

Examination of the history and policy underlying Fed. R. Crim. P. 11(a)(2), which now allows conditional guilty pleas in federal courts, is particularly instructive on the need to evaluate legal issues in a concrete factual context. Pursuant to the rule, a defendant may plead guilty yet reserve the right to challenge certain legal issues on appeal. Both the rule itself, which requires approval by the prosecutor and the district court, and the accompanying conference committee notes recognize that conditional pleas are meant for case-dispositive matters that need not be evaluated in the context of a complete trial and that such pleas should not be permitted with respect to " 'issues that cannot be adequately reviewed without a full trial record.' " *United States* v. *Curcio*, 712 F.2d 1532, 1537 (2d Cir. 1983), quoting *United States* v. *Burns*, 684 F.2d 1066,

v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 10-13; *id.* at 4-7 (Stevens, J., concurring in the judgment). For example, where evidence of guilt is overwhelming or the wrongfully admitted impeachment evidence is merely cumulative of other evidence, the error may often properly be viewed as harmless. See, *e.g.*, *Kotteakos* v. *United States*, 328 U.S. 750, 763 (1946); see also *United States* v. *Simpson*, 709 F.2d 903, 908 (5th Cir. 1983), cert. denied, No. 83-5496 (Oct. 31, 1983); *Government of The Virgin Islands* v. *Bedford*, 671 F.2d 758, 762 (3d Cir. 1982); *United States* v. *Spero*, 625 F.2d 779, 782 (8th Cir. 1980).

When a defendant does not testify, the reviewing court is required to evaluate a trial court's discretionary evidentiary ruling outside a concrete and complete factual setting, and hypothetically to determine the existence and degree of prejudice to the defendant had the proposed impeachment actually occurred. The appellate court will, however, lack the factual record necessary to determine whether the

1073 (2d Cir. 1982), cert. denied, No. 82-5609 (Jan. 24, 1983). See also *United States* v. *Thibadeau*, 671 F.2d 75, 80-81 (2d Cir. 1982); *United States* v. *Lace*, 669 F.2d 46, 57 n.7 (2d Cir. 1982) (Newman, J., concurring), cert. denied, 459 U.S. 854 (1982); Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1226 (1977); Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 Mich. L. Rev. 1265, 1286 (1978); Note, *Conditional Guilty Pleas*, 93 Harv. L. Rev. 564, 576 n.54 (1980); Comment, *Conditioned Guilty Pleas: Post-Guilty Plea Appeal of Nonjurisdictional Issues*, 26 U.C.L.A. L. Rev. 360, 370, 375, 378, 381 & n.101 (1978); D. Epstein & D. Austern, Crim. Just. Sec. ABA, *Uniform Rules of Criminal Procedure: Comparison and Analysis* Rule 444(d) (July 1975); cf. *United States* v. *Cox*, 464 F.2d 937, 945 (6th Cir. 1972).

potential error would have been cured by the trial court or the prosecutor, or whether other circumstances would have rendered the evidence properly admitted or the ruling harmless error. Most significantly, it will lack the defendant's testimony, which might have turned out to be largely immaterial to the factual and legal issues of the case.[11] Consequently, if error, an evidentiary ruling allowing impeachment of proposed testimony may be subject to virtually automatic reversal when the defendant does not testify. See *United States* v. *Cook*, 608 F.2d at 1191 (Sneed, J., dissenting in part and concurring in part); *United States* v. *Toney*, 615 F.2d at 281 (Tjoflat, J., concurring). See also pages 29-31 & note 22, *infra*. A defendant who chooses to testify, on the other hand, will be entitled to reversal only if he can point to actual prejudice. This inequality in result will not only furnish an additional appellate issue to a defendant who "has no intention of taking the stand and testifying in his own behalf" (*New Jersey* v. *Portash*, 440 U.S. at 468 (Blackmun, J., dissenting)), but will also encourage defendants to forgo the opportunity to testify, since, if they are convicted, they can still raise their evidentiary point on appeal and thus have an opportunity to force a retrial—at which they may or may not elect to testify—if the ruling was erroneous.

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[11] The importance of the defendant's actual testimony is demonstrated in the instant case, where petitioner may well not have gone beyond what the court said it would permit without admitting the impeachment evidence. See pages 11-12 note 6, *supra*.

B. It Is Not Unfair To Require A Defendant To Testify In Order To Preserve His Claim That Impeachment Evidence Was Inadmissible

It is wholly proper to require that a defendant in petitioner's position take the stand and that impeachment evidence actually be admitted over his objection in order to preserve the claim of prejudicial error in the ruling that such evidence was admissible. Such a procedure violates no rights of the defendant, constitutional or otherwise. Moreover, the courts have a clear interest in this procedure in order to ensure that such arguments are reviewed for prejudice in a concrete factual context and to prevent defendants from manufacturing claims of reversible error.

1.a. Petitioner's claim (Br. 8-13, 17) that his constitutional right to testify was infringed by the court's in limine ruling is manifestly incorrect. A defendant who testifies is subject to impeachment just as is any other witness. *Jenkins* v. *Anderson*, 447 U.S. 231, 235-236 (1980); *Grunewald* v. *United States*, 353 U.S. 391, 420 (1957); *Raffel* v. *United States*, 271 U.S. 494 (1926). The constraints facing a defendant who is subject to impeachment if he takes the stand "arise solely from the fact that the defendant is quite properly treated like any other witness who testifies at trial." *United States* v. *Grayson*, 438 U.S. 41, 57 (1978) (Stewart, J., dissenting). A violation of Rule 609 accordingly does not rise to the level of an unconstitutional infringement of the right to testify or a deprivation of due process. See *Leno* v. *Gaughan*, 664 F.2d 314 (1st Cir. 1981) (per curiam); *United States* v. *Belt*, 514 F.2d 837, 846-850 (D.C. Cir. 1975) (en banc); *Hubbard* v. *Wilson*, 401 F. Supp. 495, 498-500 (D. Colo. 1975); cf. *Spencer* v. *Texas*, 385 U.S. 554, 560-

562 (1967) (upholding recidivist statutes under which jury learns of accused's prior convictions); *Marshall* v. *Lonberger*, 459 U.S. 422, 437-438 & n.6 (1983).[12]

Significantly, petitioner had no right to a preliminary ruling on the admissibility of the prior conviction.[13] "Neither the fifth and sixth amendments

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[12] For this reason, petitioner's reliance (Br. 9-10) on *New Jersey* v. *Portash*, *supra*, is wholly misplaced. In *Portash*, the Court concluded that use for impeachment purposes of testimony compelled after a grant of immunity violates the constitutional guarantee against self-incrimination (440 U.S. at 459-460). Here, by contrast, petitioner can claim only a violation of an evidentiary rule that is not of constitutional dimension. Cf. *Middendorf* v. *Henry*, 425 U.S. 25, 48 n.25 (1976) (exposure to greater punishment in order to receive assistance of counsel does not impermissibly burden exercise of right to counsel where right itself does not independently exist). Moreover, the Court in *Portash* addressed the claim only because the state court considered it adequately preserved for appeal (440 U.S. at 455). The Court accordingly did not "decide whether it would regard the constitutional issue as having been properly presented if this case had arisen in federal court" (*id.* at 462-463 n.2 (Powell, J., concurring)). Indeed, the dissenting Justices concluded that the claim was too speculative to be reviewed even though the state court had decided otherwise. *Id.* at 467-468 (Blackmun, J., dissenting). The holding in *Portash* thus goes only so far as to establish that Article III does not preclude appellate review of in limine rulings.

[13] In criminal cases, pretrial motions may raise "[a]ny defense, objection, or request which is capable of determination without the trial of the general issue." Fed. R. Crim. P. 12(b). Rule 12(e) permits the court "for good cause" to defer ruling on a pretrial motion until trial. Of course where, as here, the motion is not made until after trial has begun, the requirements of Rule 12(e) do not apply. Moreover, because the balancing mandated by Rule 609(a) depends critically on the actual course of trial (see page 11, *supra*), it is doubtful

nor the Federal Rules of Evidence impress upon a trial court a duty to aid the defendant in formulating his trial strategy regarding the risks of impeachment

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that motions under this Rule are a proper subject for definitive pretrial determination under Rule 12(b). Even if they are, the need to take into account the actual course of trial would surely constitute "good cause" for deferring the ruling under Rule 12(e). See *United States* v. *Cook*, 608 F.2d at 1190 (Kennedy, J., dissenting in part and concurring in part). Cf. *United States* v. *Ciampaglia*, 628 F.2d 632, 637-638 (1st Cir.), cert. denied, 449 U.S. 956 (1980) (court must make co-conspirator determination at close of the evidence).

In *United States* v. *Burkhead*, 646 F.2d 1283 (8th Cir.), cert. denied, 454 U.S. 898 (1981), the court of appeals held that the district court abused its discretion in failing to rule on an limine motion under Rule 609 because the convictions in question were on substantive counts charged in the same indictment as the conspiracy charge on which the defendant was then being tried. The court of appeals recognized that "[i]n the usual case, the district court * * * has discretion to refuse to rule in advance of trial on the admissibility of impeachment evidence," but declared that "this case falls so far outside the ordinary situation that the district court's failure to rule * * * amounted to an abuse of discretion" (646 F.2d at 1285). No decision of the Eighth Circuit since *Burkhead* has reversed on the basis of a failure to rule on a preliminary Rule 609 motion. See, *e.g.*, *United States* v. *Gustafson*, 728 F.2d 1078, 1084 (8th Cir. 1984); *United States* v. *Rivers*, 693 F.2d 52, 54 (8th Cir. 1982).

Although it is not relevant to the issue here, we note that the district court's discretion to defer decision is restricted by Rule 12(e) when the government, rather than the defendant, seeks a pre-trial ruling, since the government's "right to appeal [would otherwise be] adversely affected." Fed. R. Crim. P. 12(e). See generally *United States* v. *Barletta*, 644 F.2d 50 (1st Cir. 1981).

should he decide to take the stand." *United States* v. *Witschner*, 624 F.2d 840, 844 (8th Cir.), cert. denied, 449 U.S. 994 (1980). See also *New Jersey* v. *Portash*, 440 U.S. at 462 n.1 (Powell, J., concurring) ("there is no constitutional requirement that defendants be given such a ruling at a time when only a hypothetical question can be presented"); Pet. App. 6a; *United States* v. *Cook*, 608 F.2d at 1190 (Kennedy, J., dissenting in part and concurring in part); *United States* v. *Tercero*, 640 F.2d 190, 196 (9th Cir. 1980), cert. denied, 449 U.S. 1084 (1981); *United States* v. *Kahn*, 472 F.2d 272, 282 (2d Cir.), cert. denied, 411 U.S. 982 (1973); *United States* v. *Hickey*, 596 F.2d 1082, 1087 (1st Cir.), cert. denied, 444 U.S. 853 (1979); *United States* v. *Key*, 717 F.2d at 1208; *United States* v. *Johnston*, 543 F.2d 55, 59 (8th Cir. 1976). Without such a right, petitioner's argument must fail: if he can be required to take the stand without benefit of an in limine ruling in order to raise the impeachment issue on appeal, he can surely be required to do so where, in its discretion, the court has provided him with preliminary guidance on the question.

The advance ruling provided such guidance for petitioner, but it in no way compelled him to remain silent, nor did it threaten a penalty if he chose to testify.[14] Cf. *Brady* v. *United States*, 397 U.S. 742,

[14] Petitioner's analogy (Br. 8-9) to *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), is inapt. In *Brooks*, the Court invalidated a state statute that required a defendant to testify before presenting any other witnesses, or not at all. The statute violated the right to remain silent because it "imposed a penalty for petitioner's initial silence [by prohibiting him from thereafter taking the stand], and that penalty constitutes the infringement of the right" (*id.* at 611 n.6). Here, by contrast, petitioner was free to decide whether or not he would testify.

750 (1970) (defendant's decision to take the stand or face certain conviction is not compelled); *Brooks* v. *Tennessee*, 406 U.S. 605, 614 (1972) (Burger, C.J., dissenting) (same); *United States* v. *Grayson*, *supra* (sentencing judge's consideration of defendant's false trial testimony does not impermissibly chill right to testify). See also *Selective Service System* v. *Minnesota Public Interest Research Group*, No. 83-276 (July 5, 1984), slip op. 14; *Williams* v. *Florida*, 399 U.S. 78, 84 (1970); *Crampton* v. *Ohio*, 402 U.S. at 213-215; *Harrison* v. *United States*, 392 U.S. 219, 222 (1968). For all these reasons, the in limine ruling, even if erroneous, implicated no concerns of constitutional magnitude.[15]

See generally *Jenkins* v. *Anderson*, 447 U.S. at 235-246; *Crampton* v. *Ohio*, 402 U.S. at 215; *Harris* v. *New York*, 401 U.S. 222 (1971); *Brown* v. *United States*, 356 U.S. 148 (1958). Cf. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). The in limine ruling neither compelled petitioner to testify nor required him to remain silent. It simply informed him of one of the likely consequences of his decision.

[15] Petitioner's argument to the contrary "attempts to elevate a matter of trial tactics to the level of a constitutional question" (*United States* v. *Witschner*, 624 F.2d at 844). But even if the ruling did raise constitutional problems, petitioner would still not be entitled for that reason alone to present his claim on appeal after refusing to testify. See Westen & Mandell, *To Talk, to Balk, or to Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response,"* 19 Am. Crim. L. Rev. 521, 523-527 (1982) (individuals may be required to raise constitutional claims by procedure that is least burdensome to the state); *New Jersey* v. *Portash*, 440 U.S. at 462-463 & n.2 (Powell, J., concurring) ("preferred method" of raising unconstitutional impeachment claim is for defendant to testify and appeal from a conviction).

Moreover, there is nothing in Rule 609 itself to suggest that in limine rulings should be reviewable. Cf. Westen & Mandell,

b. Petitioner's argument ultimately comes down to the assertion that the in limine ruling must be reviewable because otherwise he would be left with a difficult choice—whether to take the stand, risk impeachment and raise his evidentiary claim on appeal if he is convicted, or to forgo testifying in the belief that this would give him the best chance of acquittal.[16] The argument proves too much, for its logic would require courts to rule in all cases on in limine motions brought under Rule 609. Otherwise, defendants would be left with a tactical decision even more difficult than that faced by petitioner—they

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supra, 19 Am. Crim. L. Rev. at 524 (nothing in Fifth Amendment favors any particular procedure for preservation of self-incrimination claims). The court of appeals' suggestion to the contrary in *United States* v. *Cook* (608 F.2d at 1184) is plainly wrong. While Congress presumably intended that appellate review of Rule 609 rulings be available, there is no indication that it desired to broaden the availability of such review beyond what is normally provided when evidence is actually admitted over an objection. Indeed, to the extent that the Federal Rules of Evidence and of Criminal Procedure throw any light on the question, they suggest simply that review is generally available only when a party is prejudiced by the admission of evidence at trial over an objection. See Fed. R. Evid. 103(a); Fed. R. Crim. P. 52(a). See also 28 U.S.C. 2111.

[16] Petitioner's argument is that "a preliminary 609(a)(1) ruling can dictate the course of the entire trial, and, as such, must be subject to judicial review" (Br. 12). His related assertion that his failure to testify should not be construed as a "waiver" of his claim on appeal (*id.* at 12-13; see also *United States* v. *Cook*, 608 F.2d at 1184) confuses the concepts of waiver of a constitutional right and failure to follow proper procedures for preserving an issue for appeal. See generally *Garner* v. *United States*, 424 U.S. 648, 654 n.9 (1976); see also Westen & Mandell, *supra*, 19 Am. Crim. L. Rev. at 523.

would have to decide whether to testify and risk impeachment without any indication by the court whether it will admit the evidence in question. But, as we have made clear, petitioner had no right to an in limine ruling (pages 20-22, *supra*). He accordingly has no right to obtain review of such a ruling, which provided guidance but was not designed to eliminate the need for him to face and make what concededly may have been a difficult decision.

Difficult choices are in any event "a necessary part of the criminal justice system" (*Middendorf* v. *Henry*, 425 U.S. 25, 48 (1976)), and even though they may not be "easy or pleasant * * * to make" (*South Dakota* v. *Neville*, 459 U.S. 553, 564 (1983)), "the Constitution does not by that token always forbid requiring [a defendant] to choose" (*Crampton* v. *Ohio*, 402 U.S. at 213). There is nothing impermissible in confronting defendants in the position of petitioner with the "choice of litigation tactics" (*Jenkins* v. *Anderson*, 447 U.S. at 238) in deciding whether to testify in order to preserve an evidentiary claim for appellate review.

As we have demonstrated, a decision to admit a prior conviction under Rule 609 does not implicate or burden any constitutional right. This Court has held in a variety of contexts that government-imposed choices may properly affect the exercise of constitutional rights. See, *e.g.*, *South Dakota* v. *Neville*, *supra* (decision whether to take blood-alcohol test); *Jenkins* v. *Anderson*, *supra* (impeachment of defendant by pre-arrest silence); *United States* v. *Grayson*, *supra* (untruthful trial testimony may be considered at sentencing); *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978) (lesser punishment available if defendant pleads non vult rather than exercising right to jury

trial); *Chaffin* v. *Stynchcombe*, *supra* (jury may sentence defendant to greater term on retrial after appeal than he received at first trial); *Crampton* v. *Ohio*, *supra* (capital defendant may be tried at single proceeding to determine guilt and punishment). *A fortiori*, the tactical decision confronting petitioner here—involving no burden on a constitutional right—is not prohibited.

Petitioner's contention that he was influenced in his decision not to testify by the in limine ruling—even if accepted—in no way requires that the ruling be reviewable on appeal. See *Brady* v. *United States*, 397 U.S. at 756-757; *United States* v. *Calderon*, 348 U.S. 160, 164 n.1 (1954); cf. *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 20. Where an adequate procedure is available for a defendant to challenge a ruling, he can legitimately be required to adhere to that procedure or else to forfeit his claim. See, *e.g.*, *Namet* v. *United States*, 373 U.S. 179, 190 (1963); *McMann* v. *Richardson*, 397 U.S. 759, 768 (1970); *id.* at 782 n.5 (Brennan, J., dissenting); *Walker* v. *City of Birmingham*, 388 U.S. 307, 316-318 (1967); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Lefkowitz* v. *Newsome*, 420 U.S. 283, 289 (1975); Fed. R. Crim. P. 12(b) and (f); Westen & Mandell, *To Talk, to Balk, or to Die: The Emerging Fifth Amendment Doctrine of the "Preferred Reponse,"* 19 Am. Crim. L. Rev. 521, 523-527 (1982). For example, where a defendant has entered a guilty plea, he may not later attack his conviction on the ground that the plea was influenced by an erroneous ruling or view of the law.[17] His proper course is "to

[17] The exception now provided for conditional guilty pleas is not applicable to evidentiary claims such as petitioner's. See page 16, note 10, *supra*.

contest his guilt, prevail * * * at trial, on appeal, or, if necessary in a collateral proceeding, and win acquittal" (*McMann* v. *Richardson*, 397 U.S. at 768). He is not permitted to circumvent the normal avenues of review simply on a claim that a particular factor influenced his tactical decisions.

An adequate procedure for review was clearly available here:[18] if petitioner had taken the stand and the prior conviction had been admitted over his objection, he could have raised his claim on appeal. Indeed, Justice Powell, concurring in *Portash*, clearly expressed (440 U.S. at 462 (footnote omitted)) the desirability of presenting claims in this manner:

> The preferred method for raising claims such as Portash's would be for the defendant to take the stand and appeal a subsequent conviction, if—following a claim of immunity—the prosecutor were allowed to use immunized testimony for impeachment. Only in this way may the claim be presented to a reviewing court in a concrete factual context. Moreover, requiring that the claim be presented only by those who have taken the stand will prevent defendants with no real intention of testifying from creating artificial constitutional challenges to their convictions.

[18] Petitioner should have been aware that he might forfeit his evidentiary claim by not testifying, because prior Sixth Circuit precedent suggested this result. See *United States* v. *LeBlanc*, 612 F.2d 1012 (6th Cir.), cert. denied, 449 U.S. 849 (1980). Moreover, Justice Powell's admonition (*New Jersey* v. *Portash*, 440 U.S. at 462-463 n.2 (concurring opinion)) that this may be the only proper way to preserve such a claim in federal courts was available years before petitioner was tried. In any event, a defendant need not be explicitly advised of the proper procedure for preserving claims where it should reasonably have been evident to him. See *United States* v. *Knox*, 396 U.S. 77 (1969); *United States* v. *Kordel*, 397 U.S. 1 (1970).

There can be no claim that such a procedure would not adequately protect petitioner's interest in obtaining review of the court's evidentiary ruling.[19] Compare *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *Fay* v. *Noia*, 372 U.S. 391, 439-440 (1963); *Green* v. *United States*, 355 U.S. 184 (1957). For these reasons, a defendant may legitimately be required to testify in order to preserve for appeal his challenge to a ruling admitting a prior conviction under Rule 609.

2. The societal interest in the fair and efficient administration of criminal justice is clearly furthered by a rule ensuring that evidentiary claims such as the one here at issue are reviewed only when evidence is actually offered and admitted over a defend-

[19] While petitioner may of course have preferred an acquittal at his first trial and toward that end have decided not to testify, he could not ignore the need to establish a record to support his claims on appeal in the event of a conviction. To the extent that these courses may have conflicted, petitioner could properly be required to choose between them. See *United States* v. *Calderon*, 348 U.S. 160, 164 n.1 (1954) (defendant cannot challenge on appeal the denial of his motion for acquittal at close of prosecution's case when he supplies missing element of proof as part of his own case). See generally *United States* v. *Jorn*, 400 U.S. 470, 484 (1971) (plurality opinion) (society is not required "to assure the defendant a single proceeding free from harmful governmental or judicial error"). This is precisely the type of choice "with which criminal defendants and their attorneys are quite routinely faced" (*Crampton* v. *Ohio*, 402 U.S. at 215), and "it is not * * * inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify" (*ibid.*). See *United States* v. *Cook*, 608 F.2d at 1188-1189 (Kennedy, J., dissenting in part and concurring in part).

ant's objection.[20] This requirement is necessary to "prevent defendants with no real intention of testifying from creating artificial * * * challenges to their convictions." *New Jersey* v. *Portash*, 440 U.S. at 462 (Powell, J., concurring) (footnote omitted). See also Pet. App. 7a; *United States* v. *Cook*, 608 F.2d at 1191 (Sneed, J., dissenting in part and concurring in part); *id.* at 1191 (Kennedy, J., dissenting in part and concurring in part) (issue is "what are the most sensible requirements for establishing prejudice where evidence of prior convictions is erroneously ruled admissible in a federal trial"). A decision from this Court holding that in limine rulings are reviewable even when the evidence in question is not actually offered at trial would serve as a considerable inducement to defendants to file preliminary motions in the hope of manufacturing reversible error, even though the ruling on the motion is not in fact the dispositive consideration in their decision whether to testify. *See New Jersey* v. *Portash*, 440 U.S. at 468 (Blackmun, J., dissenting).

Such a result would hardly be conducive to the fair administration of criminal justice.[21] Because of the difficulties inherent in determining whether an erroneous in limine ruling actually prejudiced a defend-

[20] See, *e.g.*, Westen & Mandell, *supra*, 19 Am. Crim. L. Rev. at 551 ("there are compelling reasons why a state might prefer that a defendant respond to threatened impeachment by taking the witness stand").

[21] Confronted with the reversal of convictions because of errors in preliminary rulings, district courts might well become more reluctant to decide in limine motions, preferring instead to rule only when impeachment evidence is actually offered at trial (Pet. App. 6a). All parties would be left worse off without the benefit of the court's advice.

ant (see pages 11-18, *supra*), appellate courts could "'become * * * mired in harmless error.'" *United States* v. *Hasting*, slip op. 10 (quoting R. Traynor, *The Riddle of Harmless Error* 81 (1970)).[22] See generally *McDonough Power Equipment, Inc.* v. *Greenwood*, No. 82-958 (Jan. 18, 1984), slip op. 4-6. Unless courts scrupulously require that non-testifying defendants make a clear showing of prejudicial error, they will often prevail because appellate courts may prove reluctant to find an error harmless in light of the necessarily speculative nature of their inquiry. See Pet. App. 7a; *United States* v. *Cook*, 608 F.2d at 1191 (Sneed, J., dissenting in part and concurring in part); *United States* v. *Toney*, 615 F.2d at 281 (Tjoflat, J., concurring). A defendant who testifies, on the other hand, will often have a more difficult

[22] If such rulings are to be reviewable, this Court should at least make it clear that the burden will be on the defendant to demonstrate prejudice from the denial of his motion. The defendant

> would thus need to show not only that he would have testified but for the adverse Rule 609 decision and what his testimony would have been, but must also meet the burden of demonstrating that his testimony would more probably than not have altered the jury verdict.

United States v. *Cook*, 608 F.2d at 1188 (citation omitted) (Wallace, J., concurring). Cf. *United States* v. *Rivers*, 693 F.2d at 54 (defendant seeking an in limine ruling must produce sufficient facts to enable the court to rule, including a showing that he will testify if he prevails and what his testimony will be). Accordingly, should the Court decide, contrary to our position, that in limine rulings may be reviewed on appeal even when the defendant does not take the stand and the evidence in question is not admitted, we submit that the Court should, at a minimum, adopt the requirements set forth by the court of appeals in *United States* v. *Cook* (608 F.2d at 1186):

> [T]o preserve the issue for review, a defendant must at least, by a statement of his attorney: (1) establish on the record that he will in fact take the stand and testify if his challenged prior convictions are excluded; and (2) sufficiently outline the nature of his testimony so that the trial court, and the reviewing court, can do the necessary balancing contemplated in Rule 609.

Cf. Fed. R. Evid. 103(a)(2) (offer of proof). We emphasize that such an approach is hardly sufficient to overcome all of the difficulties raised by reviewability of in limine rulings. Because a defendant cannot be held to his representation that he will testify, such a representation will not in itself establish prejudice. See, *e.g.*, *United States* v. *Lipscomb*, 702 F.2d 1049, 1069-1070 (D.C. Cir. 1983); *United States* v. *Fountain*, 642 F.2d 1083, 1087 n.3 (7th Cir.), cert. denied, 451 U.S. 993 (1981). Moreover, even where a defendant offers the court his testimony in advance, his actual trial testimony may for a variety of reasons be different (see Pet. App. 9a n.4; *United States* v. *Oakes*, 565 F.2d 170, 171 (1st Cir. 1977)). How far the government may go in cross-examining a defendant in advance is also unclear (*United States* v. *Toney*, 615 F.2d at 282 (Tjoflat, J., concurring)), even though such cross-examination may be relevant to the admissibility of the evidence in question. Should the court rule in defendant's favor, but for any reason change the ruling at trial after the defendant has testified, the defendant "will claim something akin to 'entrapment'" (*ibid.*). Cf. *United States* v. *Clark*, 732 F.2d 1536, 1541-1542 (11th Cir. 1984) (court changed jury instruction from that accepted at charge conference). Moreover, the in limine procedures, even as circumscribed, can provide no assurance that the prosecutor would in the event actually decide to introduce the challenged evidence. Finally, even after all the time consumed by a hearing, and even crediting a defendant's representation that he would have testified, it will still be difficult to review the correctness of the ruling and to determine whether, if error, it actually prejudiced the defendant. *United States* v. *Toney*, 615 F.2d at 281 (Tjoflat, J., concurring); *United States* v. *Cook*, 608 F.2d at 1189 (Kennedy, J., dissenting in part and concurring in part)).

task in demonstrating prejudice; indeed, when the evidence ultimately is not offered, is not admitted, or is admitted for a concededly proper purpose, he will—quite properly, of course—have lost his claim on appeal altogether. There is no justification for granting non-testifying defendants such an advantage over those who do take the stand. Cf. Westen & Mandell, 19 Am. Crim. L. Rev. at 525 n.13.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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